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No. 87-102

IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

FIRST AFFILIATED SECURITIES, INC.,
a California corporation, et al.,
Petitioners,

vs.

MARY LOU SULLIVAN, et al.,
Respondents.

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PETTIT & MARTIN
101 California Street,
35th Floor
San Francisco, CA 94111

MICHAEL F. PERLIS
(*Counsel of Record*)
SHARON L. O'GRADY
101 California Street, 35th Floor
San Francisco, CA 94111
Telephone: (415) 434-4000

Attorneys for Petitioners
Harold E. Card,
Ira W. Palmer,
William H. Palmer,
Raymond Jallow and
Tim D. Compton

Of Counsel
August 27, 1987

(The Names and Addresses of the Attorneys for the Petitioners are Continued on the Inside Front Cover of this Brief.)

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

McCUTCHEN, DOYLE,
BROWN & ENERSEN
Three Embarcadero Center
San Francisco, CA 94111

JAMES B. LEWIS
Three Embarcadero Center
San Francisco, CA 94111
Telephone: (415) 393-2000

GEORGE E. FELDMILLER
W. PERRY BRANDT
DON M. DOWNING
STINSON, MAG & FIZZELL
2100 Charter Bank Building
Kansas City, MO 64141

Attorney for Petitioner Peat Marwick Main & Co. (formerly Peat, Marwick, Mitchell & Co.)

EDWIN D. SCOTT
PEAT MARWICK MAIN & CO.
345 Park Avenue
New York, NY 10154

SHELDON G. BARDACH
12100 Wilshire Boulevard
Los Angeles, CA 90025-7109
Telephone: (213) 207-3500
Attorney for Petitioners Paul J. Keil and Financial Communications Group, Ltd.

ROPERS, MAJESKI, KOHN,
BENTLEY & WAGNER
655 Montgomery Street
San Francisco, CA 94111

GAIL YVONNE NORTON
655 Montgomery Street
San Francisco, CA 94111
Telephone: (415) 364-8200
Attorney for Petitioners Thomas W. Tierney and Tierney & Ernst

GORDON AND REES
601 Montgomery Street
San Francisco, CA 94111

P. GERHARDT ZACHER
DIANE R. CROWLEY
601 Montgomery Street
San Francisco, CA 94111
Telephone: (415) 986-8041
Attorneys for Petitioners Carl Wright and Wright, Herfordt & Sanders

JONES, BELL, SIMPSON & ABBOTT
800 Wilshire Boulevard
Los Angeles, CA 90017

CHARLES EDWARD SIMPSON
KEVIN KIM FITZGERALD
800 Wilshire Boulevard
Los Angeles, CA 90017
Telephone: (213) 485-1555
Attorneys for Petitioners First Affiliated Securities, Inc. and Larry Gibson

Of Counsel

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I. INTRODUCTION

Respondents ("plaintiffs"), acknowledging the constitutional significance of this case,[1] nevertheless seek to obfuscate the issues with irrelevant matters and misconstruction both of *Federated Department Stores v. Moitie* and of the decisions of the second and fifth circuit courts. The opposition to the petition discussed chiefly various general principles governing parallel actions, the balance between the state and federal judicial systems, and federal preemption. None of these matters, important though they may be, is at issue in this case. The sole issue is whether there is removal jurisdiction predicated on the "election" rationale for non-preemption artful pleading under *Moitie* and its progeny.

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[1] Brief in Opposition to Petition for Writ of Certiorari at 5-6.

II. THERE IS A CONFLICT IN THE CIRCUITS WHICH WOULD AFFECT THE RESULT REACHED IN THIS CASE

Plaintiffs attempt to manipulate this case into consistency with *Travelers Indemnity Co. v. Sarkisian*, 794 F.2d 754 (2d Cir.), *cert. denied*, __ U.S. __, 107 S.Ct. 277 (1986) and *Powers v. South Central United Food & Commercial Workers Unions*, 719 F.2d 760 (5th Cir. 1983). As the Ninth Circuit itself recognized, no such reconciliation is possible. There is a clear split in the federal circuit courts which this Court should resolve.

A. The Same Result Would Not Have Obtained Under *Travelers Indemnity Co. v. Sarkisian*

Plaintiffs contend that there is no split in the circuits because this case would have been remanded under the ruling in *Travelers Indemnity Co. v. Sarkisian*. Plaintiffs contend *Travelers* relied upon a "sequence" and not an "election" rationale.[2] The crux of plaintiffs' argument is that they can defeat removal under the *Moitie* artful pleading doctrine by the simple expedient of having filed their state court action some days prior to the filing of their federal action. In so doing, plaintiffs misconstrue the Second Circuit's decision. This "artful filing" exception to the "artful pleading" doctrine is not supported by the *Travelers* decision and was rejected by both the Court of Appeals and the District Court in this case.

The *Travelers* criteria require that at least one of the claims asserted in the federal action be substantially identical to one of plaintiffs' state court claims, and that the plaintiffs must have "previously elected to proceed in federal court." *Travelers*, 794 F.2d at 760. The meaning of the "previously elected" requirement is not explained in *Travelers*. That decision, however, neither states nor suggests that that requirement means that the federal complaint must be filed before the state action is commenced. The crucial time in a determination of removability is not when the action is filed but the time of removal. *E.g., In re Carter*, 618 F.2d 1093 (5th Cir. 1980), *cert. denied*, 450 U.S. 949 (1981)

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[2] Brief in Opposition to Petition for Writ of Certiorari at 25.

(citing *Pullman Co. v. Jenkins*, 305 U.S. 534 (1939)). *See* 28 U.S.C. § 1446(b) para. 2. Thus the only reasonable interpretation of the *Travelers* "previously elected" language is that the plaintiffs' election to proceed in federal court must occur prior to removal.

The District Court in this case found that the election requirement was satisfied where plaintiffs filed their federal action shortly after the filing of this action and prior to its removal.[3] The Court of Appeals, too, rejected plaintiffs' "sequence" argument, stating:

> [T]he order of filing should make no difference. Regardless of the filing order, the plaintiff will have elected to use the federal forum and to split his claims.[4]

Thus, had the Ninth Circuit Court of Appeals applied to this case the test propounded by the Second Circuit in *Travelers*, the result would have been different—the Court of Appeals would have affirmed the District Court's denial of the motion to remand.

B. Plaintiffs Have Not Brought Themselves Within The Decision in *Powers v. South Central United Food & Commercial Workers Unions*

Plaintiffs' attempt to establish that the result would have been the same had the Court of Appeals in this case applied the reasoning in *Powers v. South Central United Food & Commercial Workers Unions*, must also fail. Plaintiffs' claim rests on the premise that they occupy the same position as the plaintiff in *Powers* because they, too, filed their federal action for defensive and tactical reasons and "ha[d] not evidenced a desire to proceed under federal law." *Powers*, 719 F.2d at 766. This premise is flatly contradicted by the factual findings of the District Court, which findings were not disturbed by the Court of Appeals.[5] The District Court explicitly found: "[P]laintiffs have evidenced their inten-

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[3] Appendix II at A-20-A-21.

[4] Appendix I at A-14.

[5] The Court of Appeals held that plaintiffs' motive in filing the federal action was irrelevant. Appendix I at A-14.

tion to utilize affirmatively the processes of the federal courts to redress the identical claimed injury alleged in their State Action."[6] The District Court also found that "plaintiffs have acknowledged their desire affirmatively to invoke the jurisdiction of the federal courts and to utilize its processes."[7] Those factual findings have never been questioned.

III. *FEDERATED DEPARTMENT STORES v. MOITIE* CREATED AN EXCEPTION TO THE WELL-PLEADED COMPLAINT RULE WHICH HAS BEEN FOLLOWED BY THE FEDERAL COURTS

Plaintiffs argue that this Court's decision in *Moitie* was limited to the issue of res judicata and created no basis for applying the artful pleading doctrine unless preemption exists. Plaintiffs state, in short, that "*Moitie* stands for no jurisdictional proposition."[8] This argument is nothing but wishful thinking on plaintiffs' part. As the District Court for the Southern District of New York, in analyzing *Moitie*, recently explained:

> *Res judicata* was the main issue before the Supreme Court. But the Court's jurisdiction depended on the propriety of the removal of Brown's state law complaint. In an important footnote, the Court approved the removal determination.

Bowlus v. Alexander & Alexander Serv. Inc., 659 F. Supp. 914, 920 (S.D.N.Y. 1987). Plainly, absent a determination by the Court that it had jurisdiction based upon artful pleading removal, the Court could not have reached res judicata issue in *Moitie*. Thus, the footnote in which the Court dealt with that removal by no means incidental, as Justice Brennan, in his dissent in *Moitie*, recognized.

Although *Moitie* did not overturn the well-pleaded complaint doctrine, it did recognize an "artful pleading" exception to it.

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[6] Appendix II at A-20.

[7] Id. at A-21.

[8] Brief in Opposition to Petition for Writ of Certiorari at 15.

> We agree that at least some of the claims had a sufficient federal character to support removal . . . . [C]ourts "will not permit plaintiff to use artful pleading to close off defendant's right to a federal forum . . . [and] occasionally the removal court will seek to determine whether the real nature of the claim is federal, regardless of plaintiff's characterization." The District Court applied that settled principle to the facts of this case. After "an extensive review and analysis of the origins and substance of" the two *Brown* complaints, it found, and the Court of Appeals expressly agreed, that respondents had attempted to avoid removal jurisdiction by "artful[ly]" casting their "essentially federal law claims" as state-law claims.[9]

This Court stated that the district court's finding on the removal issue was a factual one.[10]

Plaintiffs' reliance on decisions of this Court in support of their assertion that they are entitled to the protections of the well-pleaded complaint doctrine in this case is misplaced. Plaintiffs have not brought themselves within the purview of the doctrine. They could have done so by ignoring their federal claims and bringing their claims under only state law in state court. They did not. Instead of ignoring their federal claims, plaintiffs asserted rights to relief under federal law in federal court. Their attempt to defeat defendants' right to removal by splitting their claims between two complaints is purely a strategem to close off defendants' right to a federal forum. It is nothing but artful pleading in the purest sense, and *Moitie* makes it clear that, under the facts presented in this case, it should not be allowed to succeed.

Bowlus is not alone in regarding *Moitie's* removal determination as significant. If "*Moitie* stands for no jurisdictional proposition," as respondents contend, there are several other federal

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[9] 452 U.S. 394, 397 n.2 (citing 14 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3722, pp. 564-566 (1976)).

[10] *Id.* The Court of Appeals in this case applied a *de novo* standard of review, relying on the dissent of Justice Brennan in *Moitie*, rather than on the decision of the majority of this Court in that case.

courts that are unaware of that fact. *See Travelers Indem. Co. v. Sarkisian*, 794 F.2d 754; *Powers v. South Central Food & Commercial Workers Unions*, 719 F.2d 760 (5th Cir. 1983); *Salveson v. Western States Bankcard Ass'n*, 731 F.2d 1423 (9th Cir. 1984), *aff'g in relevant part*, 525 F. Supp. 566 (N.D. Cal. 1981); *Reid v. Walsh*, 620 F. Supp. 930 (M.D. La. 1985); *Salveson v. Western States Bankcard Ass'n*, 525 F. Supp. 566 (N.D. Cal. 1981), aff'd in relevant part, 731 F.2d 1423 (9th Cir. 1984). Even the Court of Appeals in this case, although disagreeing with the decision of other federal courts about the parameters *Moitie* removal, nonetheless plainly recognized that there is a non-preemption branch of the artful pleading doctrine as articulated in *Moitie*.[11]

IV. PLAINTIFFS DO NOT HAVE AN ABSOLUTE RIGHT TO PURSUE PARALLEL ACTIONS, THEREBY BURDENING BOTH THE STATE AND FEDERAL JUDICIAL SYSTEMS

Plaintiffs' argument about the benefits of parallel state and federal proceedings, while of interest, is irrelevant to the issue in this case. Defendants do not contest plaintiffs' right to *file* parallel lawsuits, or even to maintain parallel lawsuits if defendants do not object. Defendants do contest plaintiffs' artful attempt to prevent defendants from removing the state action to federal court if they disagree that the pursuit of parallel litigation would be beneficial and choose to assert their statutory right to remove.

Plaintiffs cite several decisions of this Court in support of their contention that they have an absolute right to pursue their parallel state and federal actions. None of those cases supports that proposition. None of the cases even addresses removal issues.[12]

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[11] Significantly, plaintiffs nowhere defend the decision of the Court of Appeals—only the result reached.

[12] In *Pennzoil Co. v. Texaco, Inc.*, ___ U.S. ___, 107 S.Ct. 1519 (1987), and *Kline v. Burke Construction Co.*, 260 U.S. 226 (1922), the plaintiffs in the state actions were defendants in the federal actions. Therefore there was no election by the state court plaintiffs to utilize the processes of the federal courts. *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941), and *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964), abstension cases, involved parallel

(Footnote continued on following page)

Defendants' position is not the all-out attack on parallel litigation that plaintiffs imply. It is not defendants' contention that there is never a right to pursue parallel litigation. The district court, on removal of the parallel state action, is free to decline to exercise pendent jurisdiction over the state law claims and could remand those claims. Here, however, the same plaintiffs filed parallel federal and state actions alleging substantially identical claims against the same defendants, based upon the identical facts, pleaded virtually identically through over sixty pages of their complaints. Defendants' contention is simply that, in such a situation, plaintiffs cannot prevent defendants from removing the state action and asking the federal court to determine whether it will exercise jurisdiction over the state claims, so that the case can be decided in a single proceeding in a single court. This decision should be the district court's and not plaintiffs'.

The "election" approach to the artful pleading doctrine does not do violence to the dual state and federal judicial systems. What does do violence to those systems is plaintiffs' claimed absolute right to maintain duplicative litigation, burdening two courts with the same case.

The course of proceeding employed by plaintiffs in this case constitutes a clear misuse of judicial resources. The prejudice to defendants in defending two actions, one of which must be dismissed before trial,[13] is obvious. The prejudice to plaintiffs of

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actions only to the extent that the plaintiffs were directed by the federal courts to bring state court actions to allow the state courts to determine important questions of state law. In *Princess Lida v. Thompson*, 305 U.S. 456 (1939), the state and federal actions involved different parties and substantially different claims. *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970) and *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518 (1986), were cases under the Anti-Injunction Act, 28 U.S.C. § 2283, in which the state court defendants never removed the actions to federal court.

[13] *See* Brief in Opposition to Petition for Writ of Certiorari at 5; *Allen v. McCurry*, 449 U.S. 90, 94 (1980) ("Under *res judicata*, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action."); *Los Angeles Branch NAACP v. Los Angeles United School*

(Footnote continued on following page)

being required to pursue their action in a single forum, in which judgment may be rendered on all of plaintiffs' claims, is not.

V. CONCLUSION

The petition for writ of certiorari should be granted.

DATED: August 27, 1987

Respectfully submitted,

PETTIT & MARTIN
101 California Street
35th Floor
San Francisco, CA 94111

Michael F. Perlis
(Counsel of Record)
Sharon L. O'Grady
101 California Street, 35th Floor
San Francisco, CA 94111
Telephone: (415) 434-4000

Attorneys for Petitioners Harold E. Card, Ira W. Palmer, William H. Palmer, Raymond Jallow and Tim D. Compton

McCUTCHEN, DOYLE BROWN & ENERSEN
Three Embarcadero Center
San Francisco, CA 94111

James B. Lewis
Three Embarcadero Center
San Francisco, CA 94111
Telephone: (415) 393-2000

GEORGE E. FELDMILLER
W. PERRY BRANDT
DON M. DOWNING
STINSON, MAG & FIZZELL
2100 Charter Bank Building
Kansas City, MO 64141

EDWIN D. SCOTT
PEAT MARWICK MAIN & CO.
345 Park Avenue
New York, NY 10154

Attorney for Petitioner Peat Marwick Main & Co. (formerly Peat, Marwick, Mitchell & Co.)

Sheldon G. Bardach
12100 Wilshire Boulevard
Los Angeles, CA 90025-7109
Telephone: (213) 207-3500

Attorney for Petitioners Paul J. Keil and Financial Communications Group, Ltd.

Dist., 750 F.2d 731, 739 (9th Cir. 1984), *cert denied*, ___ U.S. ___, 106 S.Ct. 247 (1985) (Res judicata bars a party from maintaining "a subsequent action *on any part* of the original cause of action, even if that part was not litigated in the prior action." (emphasis in original)).

ROPERS, MAJESKI, KOHN, BENTLEY & WAGNER
655 Montgomery Street
San Francisco, CA 94111

Gail Yvonne Norton
655 Montgomery Street
San Francisco, CA 94111
Telephone: (415) 364-8200

Attorney for Petitioners Thomas W. Tierney and Tierney & Ernst

GORDON AND REES
601 Montgomery Street
San Francisco, CA 94111

P. Gerhardt Zacher
Diane R. Crowley
601 Montgomery Street
San Francisco, CA 94111
Telephone: (415) 986-8041

Attorneys for Petitioners Carl Wright and Wright, Herfordt & Sanders

JONES, BELL, SIMPSON & ABBOTT
800 Wilshire Boulevard
Los Angeles, CA 90017

Charles Edward Simpson
Kevin Kim Fitzgerald
800 Wilshire Boulevard
Los Angeles, CA 90017
Telephone: (213) 485-1555

Attorneys for Petitioners First Affiliated Securities, Inc. and Larry Gibson

Of Counsel

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